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Supreme Court, U.S.
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No. 01-949

IN THE

Supreme Court of the United States

FRIENDS OF RICHARDS-GEBAUR AIRPORT,
Petitioner,

vs.

FEDERAL AVIATION ADMINISTRATION, JANE GARVEY, ADMINISTRATOR; CITY OF KANSAS CITY, MISSOURI; THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Respondents.

On Petition For a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF IN OPPOSITION OF THE CITY OF KANSAS CITY, MISSOURI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Eighth Circuit erred in affirming the Federal Aviation Administration's ("FAA") factual determination that there were no "extraordinary circumstances" requiring the preparation of a formal environmental assessment for the otherwise categorically excluded release of Richards-Gebaur Memorial Airport from federal obligations to permit non-aeronautical uses, and rejecting Petitioner's claim that the FAA's decision was arbitrary and capricious.

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Respondents.

BRIEF IN OPPOSITION OF THE CITY OF KANSAS CITY

COUNTERSTATEMENT OF THE CASE

The Court of Appeals for the Eighth Circuit correctly denied the petitions for review filed by the three petitioners below,[1] and affirmed the decision of the Federal Aviation Administration ("FAA") (1) finding no extraordinary circumstances requiring the preparation of a formal environmental assessment for the otherwise categorically excluded release of the City of Kansas City ("the City" or "Kansas City") from its federal obligations to maintain Richards-Gebaur Memorial Airport for aeronautical use, and, (2) releasing Kansas City from such obligations. *Friends of*

[1] Friends of Richards-Gebaur Airport ("Friends"), the City of Grandview, Missouri ("Grandview"), and the Aircraft Owners and Pilots Association ("AOPA").

Richards-Gebaur Airport v. FAA, 251 F.3d 1178 (8th Cir. 2001) (Pet. App. at 2).

The facts leading to the court of appeals' decision are as follows. The Richards-Gebaur Memorial Airport ("RG" or "the Airport") was built in 1941 on land owned by Kansas City. In 1955, the City deeded the property free of charge to the United States Air Force with the express understanding that the facility would be used as a permanent military base. In 1976, the Air Force deactivated the military base, declaring 1,360 acres to be surplus property. In August 1985, the Air Force conveyed the property back to Kansas City, pursuant to the Surplus Property Act of 1944, 49 U.S.C. § 47151, *et seq.*, for use as a public airport, and thereafter the Airport was used as a general aviation airport facility by Kansas City.

The Airport consistently lost money, experiencing losses exceeding $18 million between 1983 and 1997, with continuing losses projected at more than $1.5 million per year. In 1997, the City filed an application with the FAA seeking permission to close RG and to be released from federal obligations requiring the City to maintain the property for aeronautical use, thus allowing the City to redevelop the land into a new intermodal rail-truck freight distribution center. On July 14, 1998, the City and the FAA entered into a Memorandum of Agreement ("MOA") setting forth the terms and conditions pursuant to which the City would be released from its federal obligations and the Airport would be closed and redeveloped for non-aeronautical purposes, subject to the grant of the City's application for release from applicable federal obligations. The FAA stated in the MOA that the release and closure of the Airport would result in a net benefit to aviation. In addition, the MOA imposed obligations on the City to reimburse the FAA $5 million (representing the unamortized value of federal grants previously received by the City for airport projects), and imposed conditions requiring the City to use net proceeds realized from the disposition of the property for aviation-related purposes for 20 years from the date of the FAA's release.

On February 22, 1999, the City Council of Kansas City by ordinance approved a 50-year lease for the development of the facility by Kansas City Southern Railway Company. On October 22, 1999, the City submitted to FAA an extensive Environmental Documentation Report demonstrating that the closure of RG and conversion into an intermodal facility would not present any "extraordinary circumstances" that would require the preparation of an environmental assessment under the FAA's Airport Environmental Handbook (FAA Order 5050.4A). On December 23, 1999, the FAA issued a decision releasing Kansas City from its federal obligations to maintain the property for aeronautical use, and determining that the closure was categorically excluded from the requirement to prepare an environmental assessment because there were no "extraordinary circumstances" that would override the presumptive categorical exclusion under FAA rules.

Throughout the more than two years that the City's application was pending before the FAA, the public (including each of the petitioners below) had a full opportunity to participate in and comment on the City's application and on the proposed redevelopment process. Thirty-five public meetings were held in various community venues, in addition to open public meetings on the proposal before the City Council of Kansas City. One of the petitioners below, AOPA, submitted two letters to the FAA expressing various concerns about the closure, neither of which raised environmental issues. No federal, state or local governmental agency opposed the RG closure and redevelopment. Indeed, both the Missouri Department of Transportation and the Mid-America Regional Council (Kansas City's metropolitan planning organization) found the intermodal facility consistent with regional traffic and air quality considerations. The City of Belton, Missouri, the municipality located closest to the airport, supported the intermodal facility. It was not until the very day that the FAA issued its decision that the City of Grandview (which did not file a certiorari petition) faxed the FAA a brief letter asking it

to deny a categorical exclusion but submitted no analysis and no documentation to support its belated request.

Petitions for judicial review of the FAA's decision were filed by Friends, Grandview and AOPA. Friends and Grandview challenged the FAA's decision to categorically exclude the closure from the requirement to prepare an environmental assessment under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370(d) (1994). AOPA challenged the FAA's decision to grant Kansas City a release from its federal obligations.

The Court of Appeals for the Eighth Circuit denied the petitions and affirmed the FAA's determinations. Petitions for rehearing and for rehearing en banc were denied by the Court of Appeals on September 19, 2001.

A Petition for Writ of Certiorari was filed only by Friends. The two other petitioners below, including Grandview (the only governmental petitioner below), did not join in this Petition.[2]

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[2] AOPA did not file a Petition for Writ of Certiorari, but filed a Brief in response to Friends' Petition.

ARGUMENT IN OPPOSITION TO PETITION

The Petition for Writ of Certiorari challenges only one component of the Eighth Circuit's decision: the decision affirming the FAA's determination that there were no "extraordinary circumstances" requiring the preparation of an environmental assessment. The Petition is without merit and should be denied.[3] There are no important federal questions and no conflicts between circuit court decisions that need to be resolved by this Court.

The case below involved nothing more than an unexceptional judicial challenge to a decision by a federal agency, the FAA, exercising the discretion afforded to it by statute and utilizing its unique subject matter expertise. The court of appeals' thorough and well-reasoned decision applied well-settled standards of review to determine whether the FAA's decision was arbitrary and capricious. The court of appeals correctly concluded, on the particular facts of the case, that the FAA had reasonably exercised its discretion in determining that there were no "extraordinary circumstances" that would require an environmental assessment for the closure of the Airport. The Eighth Circuit's fact-specific decision does not implicate any legal or policy issue worthy of review by this Court, and Friends' Petition should receive the same result as the petitioners' below unsuccessful

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[3] As noted above, AOPA did not file a Petition for Writ of Certiorari. However, AOPA's brief to this Court in support of Friends' Petition does not even mention the environmental issues raised by Friends, but rather focuses solely on the court of appeals' other ruling that the FAA's decision to release the City from its federal obligations was not arbitrary, capricious, and contrary to law. Friends' Petition did not challenge that decision of the court of appeals. Having failed to file its own timely petition, AOPA cannot now present issues on the legality of the FAA's decision through the guise of a Brief in support of Friends' Petition. In any event, AOPA's position directly contravenes the Petitioner's. Friends argues that the Eighth Circuit did not give FAA's Handbook enough deference, while AOPA asserts that the Eighth Circuit gave the FAA too much deference. Both are wrong.

challenges (including the unsuccessful requests for en banc review) to the court of appeals.

A. There Is No Conflict Between Circuits

Petitioner attempts to manufacture a conflict between the Eighth Circuit's decision below and the Seventh Circuit's decision in *Rhodes v. Johnson*, 153 F.3d 785 (7th Cir. 1998), with respect to the standard of deference to be given to agency orders established pursuant to NEPA. Petitioner erroneously claims that "had the Eighth Circuit ruled consistently with the Seventh Circuit, the FAA's granting of a categorical exclusion would have been reversed." Pet. at 19. Petitioner blithely ignores the significant substantive differences between this case and *Rhodes*, and boldly misrepresents the Eighth Circuit's holding with respect to the deference issue.

First, *Rhodes* is not applicable here. *Rhodes* involved a case in which the federal agency, in that case the U.S. Forest Service, acknowledged that there were at least two "undisputed 'extraordinary circumstances'", but then determined that those extraordinary circumstances would not have a significant impact on the environment without performing an environmental assessment. Thus, the Seventh Circuit found:

> The Defendant [U.S. Forest Service] concedes that at least these two extraordinary circumstances are present . . . thus, there is no dispute that the proposed actions here are categorical exclusions but that there are also present at least two extraordinary circumstances that 'may have a significant environmental effect.'

153 F.3d at 789.

Unlike *Rhodes*, the instant case did not involve a finding by the FAA that there were any "extraordinary circumstances." Indeed, to the contrary, the FAA determined

that there were no extraordinary circumstances, and the court of appeals simply affirmed that factual determination.

This Court does not grant petitions for writ of certiorari to "review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *See Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J.); *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178 (1938) ("Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it.") The question of whether there exists extraordinary circumstances is one of fact and the inferences to be drawn from the facts. Accordingly, this case does not present a matter that warrants Supreme Court review.

Second, *Rhodes* is also inapposite because, unlike the FAA Handbook, the U.S. Forest Service Handbook was promulgated by notice and comment (*i.e.*, the normal rulemaking process) and was thus treated by the Seventh Circuit as a "regulation" entitled to full *Chevron* deference. *See Rhodes*, 153 F.3d at 789; *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). By contrast, the FAA's Environmental Handbook was not subject to notice and comment. Therefore, under this Court's holdings in *United States v. Mead Corp.*, 533 U.S. 218 (2001) and *Christensen v. Harris County*, 529 U.S. 576 (2000), the Handbook is not entitled to *Chevron* deference but rather to respect in accordance with its power to persuade.

Moreover, Petitioner mischaracterizes the Eighth Circuit's standard of review. Contrary to Petitioner's claim, the Eighth Circuit did not disregard or deviate from the FAA Environmental Handbook. Rather, the Eighth Circuit carefully and thoroughly followed the FAA Handbook and reviewed the FAA's actions in light of each and every specific element set forth in the Handbook with respect to the existence or lack of existence of extraordinary circumstances, and thoroughly explained its reasons for affirming the FAA's decision that no such extraordinary circumstances were present. Thus, the Eighth Circuit concluded:

> The FAA documented its categorical exclusion evaluation in this case in which it considered and discussed the relevant extraordinary circumstances listed in FAA Order 5050.4A. . . . The FAA concluded that based upon its evaluation of the likely impacts of the proposed action, no extraordinary circumstances existed to preclude a categorical exclusion of this action from the environmental assessment requirement.

Friends, 251 F.3d at 1186 (Pet. App. at 11-12).

Third, since *Rhodes* was decided before the *Christensen* and *Mead* decisions, even if the underlying factual and legal circumstances in *Rhodes* and the instant case were similar (which they are not), there could be no "conflict" between the pre-*Christensen/Mead* Seventh Circuit decision and a post-*Christensen/Mead* Eighth Circuit decision.

Finally, given the Eighth Circuit's thorough analysis of the consistency of the FAA's actions with the requirements of the FAA Environmental Handbook, the outcome would have been the same whether *Chevron* deference or *Christensen* deference were applied.

B. There Are No Other Bases For Supreme Court Review

Having dispensed with the alleged deference and circuit conflict issues, there are no other bases for certiorari. The Petition represents nothing more than sour grapes disagreement with the judgment of the Eighth Circuit that the FAA's decision was neither arbitrary nor capricious. Petitioner merely repeats arguments that were made to and rejected by the Eighth Circuit not once, but twice.

Petitioner claims that the projected level of carbon monoxide (CO) emissions from the intermodal project for the year 2018 "violates state standards", and therefore constitutes an extraordinary circumstance. Pet. at 15. That assertion is completely erroneous. First, there is no case law or regulatory

guidance addressing what level of emissions, occurring at what point in time, should be considered "significant" for purposes of requiring an environmental assessment. Second, Kansas City is classified as an "attainment area" for CO. As a consequence, the conformity regulations (which establish that emissions of 100 tons or less are considered "de minimus") do not apply to ***any*** CO emissions in the Kansas City area. *See Environmental Def. Fund Inc. v. EPA*, 82 F.3d 451, 454 n.2 (D.C. Cir. 1996) (explaining that Congress restricted "conformity" applicability to "non-attainment" and "maintenance" areas). Thus, the alleged 100-ton threshold does not apply to the intermodal facility. Third, even if Kansas City were classified as "maintenance" for CO emissions (which it is not), the FAA's "worst-case projection" indicates emissions slightly exceeding 100 tons of CO emissions in the eighteenth year, far too low and remote in time to trigger any concern; certainly not enough to constitute a "violation" of any state or federal law or establish a "significant" environmental impact.

This same argument was made by the Petitioner to the Eighth Circuit and properly rejected by that court: "The new calculations provided by the FAA continue to indicate that the air quality effects of the new facility do not rise to a significant level." *Friends*, 251 F.3d at 1191 (Pet. App. at 22). This issue involves a question of fact, which the FAA resolved and the court of appeals affirmed. As stated above, a writ of certiorari is not appropriate merely to "review the evidence or inferences drawn from it." *General Talking Pictures Corp.*, 304 U.S. at 178.

Petitioner next claims that Grandview's tardy and superficial submission to the FAA constituted an "extraordinary circumstance" demonstrating that the project was "highly controversial on environmental grounds." There is no basis for this Court to review the Eighth Circuit's conclusion that Grandview's "thirteenth-hour" letter faxed on the very day of the FAA's decision was, in the words of the court of appeals: "too little, and far too late in a public

proceeding that had been ongoing for approximately 2 years." *Friends*, 251 F.3d at 1187 (Pet. App. at 13). It is highly significant that Grandview itself has not sought review in this Court.

Finally, Petitioner asserts that the FAA failed to apply an interdisciplinary approach because it failed to examine and consider the construction of railroad tracks for the intermodal facility as part of its evaluation. This assertion also is without merit, as the Eighth Circuit properly concluded. The court of appeals found that "the FAA did not categorically exclude the construction of a railroad track," but rather

> The FAA properly considered the potential environmental impact that might result from the proposed facility. Whether the construction of track is considered a railroad line subject to the jurisdiction of the Surface Transportation Board (STB), . . . or an industrial, team, switching, or side track that is not within STB's jurisdiction . . . is a matter to be considered in the first instance by the STB. We agree with the FAA that this question is not properly before us at this time. It is enough that the FAA considered the relevant resulting environmental factors and determined them to have no significant impact on the environment.

Id. at 1192-1193 (Pet. App. at 25).

Both the FAA and the Eighth Circuit were correct. The FAA was not only not required to consider the effect of future track construction, it had no jurisdiction to do so. If future track construction involved railroad lines, the Surface Transportation Board would have exclusive, preemptive jurisdiction (under 49 U.S.C. § 10901) with respect to such matters, and only the STB would have the authority to determine whether an environmental assessment or an environmental impact statement would be required under its regulations. To the extent that the future track involved a spur, industrial, team, switching, or side track, then under 49

U.S.C. § 10906, STB has no authority to approve, disapprove, license or otherwise regulate such construction, and there would be no "major federal action" with respect to such construction for NEPA purposes. The FAA has neither the jurisdiction nor authority over construction of rail lines of any nature, and therefore was not required or even permitted to assess the environmental impact of track construction at the intermodal facility, as the Eighth Circuit correctly concluded.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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